No. 14,924

United States Court of Appeals

For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the United District Court for the District of Oregon entered on a verdict of a jury in an action founded upon the Federal Employers' Liability Act (U.S.C.A. Title 45, Sec. 51 et seq. and Sec. 23 et seq.). Jurisdiction of the District Court rested upon U.S.C.A. Title 45, Sec. 56 and the jurisdiction of this Court upon appeal is conferred by U.S.C.A. Title 28, Sec. 1291.

STATEMENT OF THE CASE.

This action was brought under the provisions of the Federal Employers' Liability Act U.S. Code Annotated Title 45, Sec. 51 et seq. and Sec. 23 et seq.

The plaintiff, Mary E. Daulton, is the widow and administratrix of the estate of Donald LeRoy Daulton, deceased. The deceased Donald LeRoy Daulton was a brakeman employed by the defendant near Wocus, Oregon, a siding about two and one-half miles north of Klamath Falls, Oregon.

By the pre-trial order which supersedes the pleadings in this action, it was determined that the deceased, while engaged in his work as a brakeman on the 6th day of October, 1952, suffered injuries which caused his death.

(P.T.* page 15 and page 16.)

The deceased, at the time of his death, was riding on the front footboard of an engine that was pulling the cars of a work train. The plaintiff's contentions, as contained in the pre-trial order were:

(1) That the footboard on which plaintiff was riding was unsafe in that the head of the bolt used to fasten the footboard to a bracket protruded above the surface of the footboard constituting a violation of the Federal Boiler Inspection Act, 45 U.S.C.A. 23;

(2) That the train was not stopped immediately in accordance with the custom and practice when deceased disappeared from the view of other members of the train crew;

(3) That the engineer was operating and controlling the train without signals from the train crew; and

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*P.T. refers to Printed Transcript.

(4) That the engineer relied on signals from the conductor or other trainmen instead of from the deceased or head brakeman; and

(5) That the aforesaid conduct caused deceased to receive injuries from which he died.

(P.T. page 17.)

The defendant railroad, by the pre-trial order, denied that it was guilty of negligence or any act or omission that was the proximate cause of the death of the deceased.

(P.T. page 19.)

The cause was then tried as to the liability of the defendant upon two issues framed and stated in the pre-trial order:

(1) Was defendant's engine improper or unsafe in any particulars charged and, if so, was such unsafe condition a proximate cause of the death of the deceased?

(2) Was the defendant guilty of negligence in any particular as charged and, if so, was such a proximate cause of the death of the deceased?

(P.T. page 19.)

The jury returned a verdict in favor of the defendant upon which judgment was entered. A motion for new trial was subsequently made and denied.

(P.T. page 27.)

SUMMARY STATEMENT OF EVIDENCE AND PLAINTIFF'S THEORY FOR A RECOVERY.

We will here summarize what evidence we feel to be essential for a determination of the issues here involved.

The deceased was a brakeman employed by the defendant and at the time of his death was engaged in his employment on a work train at a point about one mile south of Wocus, Oregon.

(P.T. page 46.)

The work train was moving north toward Wocus for the purpose of proceeding into a siding so that two approaching trains could pass.

(P.T. page 47.)

There were welders working alongside of the track that the work train would have to pass.

(P.T. page 46.)

The deceased was the head brakeman and it would have been his duty to have lined the switch when the train reached it so that the work train could have entered the siding.

(P.T. page 48.)

He rode on the front right footboard of the engine. The conductor or the engineer, depending where the brakeman was located, were in charge of telling the men where to ride.

(P.T. page 51.)

The purpose for Mr. Daulton to be on the front of the train, in addition to letting the train into the siding, was to pilot the train by the welders.

(P.T. page 51, page 52.)

When the train was about forty car lengths from the switch deceased went out of sight of the engineer.

(P.T. page 116.)

All the witnesses who were working for the defendant in an operating capacity, except the engineer who stated he did not know of such a custom (P.T. page 122, page 123) and the superintendent of the Southern Pacific, testified that the train should have been stopped immediately when the deceased went out of sight of the engineer.

The engineer continued on after the deceased had disappeared up to a point approximately a car to two car lengths south of the switch.

(P.T. page 49.)

When the signal did not change indicating that the switch had not been lined for the train to proceed into the siding a search was begun to find out what had happened to Daulton whose duty it was to have lined the switch for the movement.

(P.T. page 124.)

He was found under the front trucks of the engine tender.

(P.T. page 49.)

And his personal effects were scattered along the track for about three to four car lengths or in the neighborhood of one hundred feet.

(P.T. page 49.)

The train could have been stopped in from ten to fifteen feet.

(P.T. page 51.)

Upon the above facts, plaintiff's theory of responsibility on the part of the defendant was based upon a violation of the Federal Boiler Inspection Act and the failure of the engineer to stop in accordance with custom and practice when the deceased disappeared from the view of the engineer. There were no witnesses to what actually happened. It was plaintiff's contention pursuant to the above issues which were contained in the pre-trial order that deceased tripped or slipped on the bolt that allegedly protruded from the footboard and fell or, not having done that, in some manner lost his balance some thirty-seven car lengths before he was killed, held on until finally some one hundred feet before the train stopped he fell under the wheels and was dragged and sustained injuries that resulted in his death. The personal effects extended in a southerly direction from his body for approximately one hundred feet. The train could have been stopped when the deceased disappeared from the sight of the engineer in a distance of not over fifteen feet which would have been some thirty-seven car lengths from where his personal effects were first found. Thus, the jury could have found the defendant railroad liable for a violation of the Boiler Inspection Act which was a proximate cause of deceased's death; or the jury could have found that a proximate cause of deceased's death was the negligence of the defendant because the train was not stopped immediately by the engineer upon the disappearance of the deceased from his view; for had the train been stopped the deceased would not have

been killed as the train traveled about thirty-seven car lengths before there was any evidence of the deceased having been injured.

ERRORS RELIED UPON FOR REVERSAL OF JUDGMENT.

The points relied upon by the defendant for a reversal of the judgment and the order in which they appear in the argument below are as follows:

1. The Trial Court erroneously instructed with reference to the contributory negligence of the deceased which was without evidentiary support and not an issue presented by the pre-trial order, as follows:

(a) "Likewise, Daulton was responsible for his own actions, and if the death was a result of his own actions, without the direction of anyone or without the compulsion of some rule or direction of the superior employes, and he was acting voluntarily under the circumstances, and as a result of his own fault, which was not necessarily a part of his duties, if he fell from the train in that way and the railroad was not guilty of having an engine which was in improper condition or if it was not guilty of any of the other acts which are charged or omissions which are charged, then, of course, (142) his Administratrix could not recover."

(P.T. p. 162.)

(b) "In other words, if you should find a situation where you could say that Daulton by his own act, independent of any other circum-

stances, caused his own death, then of course the railroad would not be liable for that."

(P.T. p. 169.)

(c) "There is one factor that I have mentioned in regard to this. That is the factor of contributory negligence. Contributory negligence is not a defense in this case at all. As you will remember from what I said in the first part of the instructions, contributory negligence will not be considered at all if you find that there was a violation of the statute with reference to the condition of the egnine or the footboard. If you find that, you won't consider contributory negligence at all, if you find that that was a proximate cause of the death. On the other hand, if you find simply that there was a negligent condition, and that the railroad was guilty of negligence in some of the particulars in evidence, and that was a proximate cause, then in that regard you have a right to consider the conduct also of the decedent Daulton. If you find that he was contributorily negligence to a certain extent, then you can consider that in setting up the measure of damages.

Now I have given you the measure of damages for the full amount. Now I am taking up a consideration of damages based upon this determination alone with regard to the negligence (154) of the railroad and proximate cause, and if you also find that Daulton was contributorily negligence then you would not award the full amount to the Administratrix, but you would cut it down in accordance

with the principles that I am about to announce to you."

(P.T. p. 172.)

(d) It is your duty as jurors to determine how much Daulton's lack of care contributed to the cause of the accident."

(P.T. p. 173.)

(e) "But you must remember that if Daulton was solely at fault, and no negligence on the part of the railroad contributed to his death, then you would not permit any recovery at all and you would not arrive at any consideration of damages. (155)"

(P.T. p. 174.)

The foregoing instructions were excepted to by appellant.

"The Court. Any exceptions, Gentlemen?

Mr. Brobst. There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given."

(P.T. p. 175.)

2. The Trial Court committed prejudicial error in limiting argument of counsel for appellant.

3. Error was committed by reason of the failure of the defendant to disclose by the pre-trial order that

pictures to be used by plaintiff and appellant were not pictures of the engine footboard involved in the accident.

4. The Trial Court committed prejudicial error by commenting upon the testimony of an expert witness called by appellant.

(P.T. p. 179.)

ARGUMENT.

(a) THE COURT ERRONEOUSLY INSTRUCTED THE JURY WITH REFERENCE TO CONTRIBUTORY NEGLIGENCE OF THE DECEASED WHICH WAS NOT AN ISSUE IN THE CASE.

There were only two issues with reference to the liability phase of the case that were framed by the pre-trial order for determination of the jury. They were:

(1) Was defendant's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of the deceased?

(2) Was the defendant guilty of negligence in any particular as charged and, if so, was such a proximate cause of the death of the deceased?

Yet, the Trial Court instructed the jury as follows:

> ". . . In other words, if you should find a situation where you could say that Daulton by his own act, independent of any other circumstances, caused his own death, then of course the railroad would not be liable for that."
>
> (P.T. page 169.)

"But you must remember that if Daulton was solely at fault, and no negligence on the part of the railroad contributed to his death, then you would not permit any recovery at all and you would not arrive at any consideration of damages."

(P.T. page 174.)

In between the above quoted instructions the Court included in its charge on damages the element of contributory negligence.

(P.T. page 172, page 173.)

And stated:

"It is your duty as jurors to determine how much Daulton's lack of care contributed to cause the accident."

(P.T. page 173.)

The same instruction was given in the Court's preliminary remarks.

"Likewise, Daulton was responsible for his own actions, and if the death was a result of his own actions, without the direction of anyone or without the compulsion of some rule or direction of the superior employees, and he was acting voluntarily under the circumstances, *and as a result of his own fault* (emphasis added) which was not necessarily a part of his duties, if he fell from the train in that way . . . his administratrix could not recover."

(P.T. page 162.)

Where there are no witnesses to the conduct of a deceased person in a wrongful death action the de-

ceased is, as a matter of law, presumed to have been in the exercise of ordinary care and consequently free of contributory negligence.

"To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. *Looney v. Metropolitan R. Co.,* 200 U.S. 480, 488, 50 L. Ed. 564, 569, 26 S.C. 303; *Atchison, Topeka & S.F.R.Co. v. Toapo,* supra (281 U.S. 356, 74 L. Ed. 900, 50 S.C. 281); *New Aetna Portland Cement Co. v. Hatt* (C.C.A. 6th) 231 Fed. 611, 617, 13 N.C.C.A. 334."

Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 88 L. Ed. 520, cited with approval in *Miller v. Southern Pacific Co.,* 117 Cal. App. 2d 492.

Exception was taken to the above instructions.

"The Court. Any exceptions, Gentlemen?

Mr. Brobst. There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given."

(P.T. page 175.)

In addition to the fact that the instructions dealing with contributory negligence of the deceased being outside the issues of the pre-trial order and being

contrary to the law, they were prejudicially erroneous as worded. In each of the above quoted instructions the court assumes that the deceased was himself at fault. For, nowhere in the quoted instructions was the jury advised that they must find *from a preponderance of the evidence* that the deceased was at fault. In fact, the last and most prejudicial instruction definitely told the jury that the deceased did not use ordinary care.

> "It is your duty as jurors to determine how much Daulton's lack of care contributed to cause the accident."
>
> (P.T. page 173.)

This was in direct contravention of the law which presumes, in the absence of evidence as to how the accident actually occurred, that the deceased was in the exercise of ordinary care.

> *Tennant v. Peoria & Pekin Union R. Co.,* supra.

There was no issue in the pre-trial order presenting the defense of fault or contributory negligence upon the part of the deceased.

Clearly instructing on matters outside of the issues and in conflict with the legal presumption was error of a most serious nature and highly prejudicial. In the case of *Barry v. Reading Company,* 3 F.R.D. 305, the Court would not instruct on the question of negligence where the sole contention set up in the pre-trial order was that liability was based on a defective brake. It was held there that the instruction

should not be given because it was not an issue contained in the pre-trial order.

> "In the case of *Geopalos v. Mandes,* D.C. 35 Fed. Supp. 276, the court said:
>
> 'It is well recognized that pre-trial proceedings are for the purpose, among other things, of simplifying issues and eliminating those which are not relied upon' ".

Again, where the issues to be determined in an action were settled in a pre-trial conference, the issues there contained thereafter controlled the case and the Court refused to give instructions inconsistent with the two issues of the pre-trial order. The Court there said:

> "At a pre-trial conference the issues in the case were discussed and set forth in a pre-trial order which under the rule controlled the case...."
>
> *Bryant v. Phoenix Bridge Co.,* 43 Fed. Supp. 162.

.The pre-trial order having set forth the two issues involved in this action and there being no issue raised of contributory negligence or negligence upon the part of the deceased, it was clearly prejudicial error to give the foregoing instructions.

> "This Court has held that: 'An instruction which would allow the jury to render a verdict on an issue not of the pleadings is erroneous'. In 53 Am. Jur. Trial Sec. 574 p. 452 a related rule is stated as follows: 'It is a well settled general principle that the instructions given by the trial court should be confined to the issues

raised by the pleadings in the case at bar and the facts developed by the evidence in support of those issues or admitted at the bar.' See also, 64 C.J. Trial Sec. 651, p. 745. . . ."

Ellis v. Union Pacific R. Co., 27 N.W. 2d 921.

"It is clearly prejudicial error for the court to inject into a case an issue or question not raised by the pleadings or the evidence, if it would tend to confuse the questions properly in the case and mislead the jury to the prejudice of appellant."

Doering v. City of Cleveland, 114 N.E. 2d 273.

There was added emphasis to this error for the Court instructed that plaintiff had to prove the liability by a preponderance of the evidence.

"But the plaintiff must prove, in order to have a basis to establish liability, that some of these contentions are established by a preponderance of the evidence."

(P.T. page 162.)

The negligence, if any, of the deceased, contributory or otherwise, if it had been made an issue by the pre-trial order, would have constituted an affirmative defense to be established by the defendant by a preponderance of the evidence. The Court gave no instruction requiring the defendant to prove negligence, if any, upon the part of the deceased. The Court, as set out above, simply told the jury that contributory negligence, if it was the sole cause of the death of Donald LeRoy Daulton, would prevent a recovery by the plaintiff. Plaintiff then, in accordance with the given instruction, was actually required to prove her

case as to the violation of the Federal Boiler Inspection Act and failure to observe a custom and practice, by a preponderance of the evidence; and, in addition, she had the burden of proving that deceased was free from negligence. There was no affirmative defense put in issue by the pre-trial order, consequently the plaintiff had the burden of establishing liability in accordance with the issues, and by the erroneous instructions she was required to prove the deceased free from fault. It is urged that this erroneous sequence of instructions dealing with a subject outside the issues presented by the pre-trial order prevented plaintiff from having a fair trial and that the judgment should be reversed.

(b) THE TRIAL COURT WAS IN ERROR IN LIMITING ARGUMENT OF COUNSEL.

Rule 51 of the Federal Rules of Civil Procedure provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. . . ."

The obvious reason for this rule is so that counsel can intelligently present to the jury his side of the case in the light of the facts and law. It is a recognized rule that argument of counsel is supposed to

present the issues, *the applicable law,* (emphasis added) and the pertinent evidence.

"In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, *the applicable law,* (emphasis added) the pertinent evidence, and such legitimate inferences as may properly be drawn therefrom."

London Guarantee & Accident Co. v. Woelfle, 83 Fed. 2d 325;

Chicago & N.W.Ry. Co. v. Kelly, 84 Fed. 2d 569.

"Nor is there any merit in the contention that counsel for plaintiff was permitted to make improper argument to the jury when after discussing some of the evidence he said: 'I think the Court will instruct you as to the law.' Objection was then made, and the argument is that counsel should not be permitted to tell the jury what the Court would instruct them as to the law. It is entirely proper for counsel to say in his argument that he thinks the Court will instruct the jury—stating the law which he thinks the Court will give."

Nuins v. Mutual Ben. Health Co. Accident Assn., 319 Ill. App. 239, 48 N.E. 2d 796.

"Although an attorney in his argument to the jury may state the principles of law applicable to the action so far as it is necessary to enable him to discuss the evidence intelligently. . . ."

Makina v. Spokane, P. & S. Ry. Co., 155 Ore. 317, 63 Pac. 2d 1082, 1089.

"That counsel may in his argument, state what the law is and apply the law to the facts in the case is well established in California, provided of course, the statement of what he considers to be the law is correct."

People v. Dykes, 107 Cal. App. 107, 118;

De Armos v. Dickerman, 108 Cal. App. 2d 548, 239 Pac. 2d 65.

Counsel for plaintiff asked the trial Court if it would be permissible in argument to refer to the instructions that might be given by the Court in order to conform the facts to the law as the Court would instruct. The trial Court advised plaintiff's counsel that no such argument would be permitted.

"Mr. Brobst. There was one other point, and that is this: In argument sometimes I like to refer to the instructions that will be given, and ask the jury to listen for them, to bring out and emphasize a point.

The Court. I would not suggest taking any chance on doing that here.

Mr. Brobst. I don't want to get up and say—

The Court. Not only that, but I have a personal custom, which all judges do not follow, and that is that I do not permit you to argue the law or to say that I am going to give an instruction, because I think that gives undue emphasis to the particular point that is being brought out, and the other side can get up say that I am going to say just absolutely the contrary. I might give something in between. As a matter of fact, I usually don't know what I am going to say to a jury—

Mr. Brobst. I am confronted with that problem myself when I get up to argue sometimes. This other point: I may explain the Act to them, the way it operates, that he was not covered by State compensation, and that the only recovery is under this Act?

The Court. You will have to leave that to me.

Mr. Brobst. That is what I want to know. You are taking (86) all my argument away from me."

(P.T. page 114, page 115.)

As shown by the above discussion with the Court, counsel was precluded from arguing the law or referring to the instructions. In addition, the Court prevented any statement with reference to the Federal Employers' Liability Act and that that act provided the only means of recovery for railroad employees engaged in interstate commerce. The Court stated that counsel would have to rely upon the Court for an explanation of that act. However, the reference made by the Court to the Act in instructing the jury would do nothing but leave an impression that there was other compensation that the plaintiff would receive.

"Of course, likewise, I don't need to say that you are not to consider what might be given under State law or some other law of compensation under certain circumstances to these people, or anything of the sort. You are to determine this strictly upon the question of whether or not there is liability under the instructions I have given you and then turn to the question of damages,

and on the question of damages follow the rules that I have given you. Of course, that cuts out of your consideration any possibility of some other statute or some other jurisdiction or some other law under which compensation might be given to them. I don't want to bring your attention to what those might be. This is tried in a very narrow channel, and these instructions that I give you show you what the limits are and what you are governed by, first on the question of liability and then on the question of damages. (153.)"

(P.T. page 171.)

Many times in these actions, juries are under the impression that an action of this kind is solely for the purpose of acquiring additional compensation or to repay to some source what the widow has received which would be somewhat in the nature of a subrogation claim. The situation was not thoroughly explained and, in fact, the very impression that counsel sought to clarify by argument was emphasized in the instruction when the Court said:

"Of, course, likewise I don't need to say that you are not to consider what might be given under State law or some other law of compensation under certain circumstances to these people, or anything of the sort . . . Of course that cuts out of your consideration any possibility of some other statute or some other jurisdiction or some other law under which compensation might be given them. I don't want to bring your attention to what those might be."

(P.T. page 171, page 172.)

Certainly, the Court by stating that it did not "want to bring your attention to what those might be," referring to other statutes, other jurisdiction, and some other law, could not have done other than arouse the curiosity of the jury in line with what we have previously stated. Certainly, this was an inadequate, if not misleading explanation of the rights of the plaintiff under the Federal Employers' Liability Act which was the only means by which plaintiff in this action could recover compensation for the death of the deceased. It is submitted that this further limitation prevented counsel from presenting an adequate and logical explanation of the act and which prevented plaintiff from having a full and fair trial.

(c) DEFENDANT FAILED TO DISCLOSE AT THE PRE-TRIAL, THAT THE PICTURES OF THE FOOTBOARD INTENDED TO BE USED BY THE PLAINTIFF WERE NOT PICTURES OF THE FOOTBOARD INVOLVED IN THE ACCIDENT.

Plaintiff produced for the defendant for the pre-trial order the pictures that plaintiff had taken of the footboard upon which plaintiff was standing in front of the engine. Defendant had these pictures in its possession for a considerable time prior to the making of the pre-trial order. Defendant was well aware that the pictures had been taken some time after the accident.

(P.T. page 73.)

Yet, at no time until the end of the trial did defendant establish as a defense which was not mentioned

in the pre-trial that the footboard involved in the accident had been removed shortly after the accident.

(P.T. page 139.)

There was no report made on the daily locomotive inspection reports indicating there had been any change in the locomotive footboards.

(P.T. page 140.)

This is a situation similar to the facts in *Burton v. Weyerhaeuser Lumber Co.*, 1 Fed. 571, where the defendant withheld from the plaintiff the fact that the burns that the plaintiff in that action had received could not have come from the acid named in the complaint and demonstrated in Court by placing the acid named in the complaint on the hand of an employee of the defendant and leaving it for several minutes and then washing it off without having any burns. The Court there said:

> ". . . but it must be made clear that surprise, both as a weapon of attack and defense is not to be tolerated under the new Federal Procedure."

The failure to advise plaintiff of this defense misled the plaintiff into placing the picture in evidence creating a false issue. This false issue could do nothing but confuse the jury and perhaps, antagonize them, because they may have felt that the plaintiff was endeavoring to mislead them with misrepresentative pictures. More confusing was the fact that the footboard involved in the accident was replaced by an old one with a protruding bolt. (See Plaintiff's Exhibits A, B, C.) Had the plaintiff been aware of this defense

the case would have been tried purely on the failure to stop the train when Daulton disappeared, for the injury and death, as evidenced by Daulton's personal effects, did not occur until some thirty-seven car lengths after he disappeared from the view of the engineer. The accident could have been avoided had the engineer stopped as he should have done in conformity with the custom and practice. This surprise and resulting confusion of pictures could not help but be prejudicial to plaintiff.

(d) PREJUDICIAL COMMENT OF TRIAL JUDGE WITH REFERENCE TO THE TESTIMONY OF EXPERT WITNESS CALLED BY PLAINTIFF.

The witness, Zimmerman, was called by the plaintiff to testify to the stopping distance of a train composed of the same type of cars as the train involved in the accident. He was a switchman employed by the defendant and had been so employed for eighteen years.

> "Q. Mr. Zimmerman, what is your business or occupation, please?
>
> A. I am a switchman for the Southern Pacific Company.
>
> Q. How long have you been employed by the Southern Pacific Company?
>
> A. 18 years."
>
> (P.T. page 75.)

He had been a helper on switch crews and he had been an engine foreman and had worked two months as a brakeman.

"Q. What types of work have you done generally?

A. Helper on switch crews and engine foreman, and two months as brakeman."

(P.T. page 77.)

After this qualification he was asked in what distance the movement of an engine, two K and J cars, a ditcher, and a caboose traveling at two to four miles an hour could have stopped.

(P.T. page 77.)

The Court sustained an objection and stated:

"I think that is correct. I don't think he has had any experience to qualify him to answer."

(P.T. 78.)

The same general question was again asked (P.T. page 78) and over objection the Court permitted him to answer but, in so doing, completely discredited his answer by the following statement:

"He has worked around trains. It is a question for the jury. Ladies and Gentlemen of the jury, I think that this witness has shown no particular qualifications, anymore than you or I would have about this, but he has seen trains in operation, perhaps. . . ."

(P.T. page 78.)

Certainly, this trainman who had worked for the defendant for eighteen years as a switchman and engine foreman was qualified to testify as to the stopping distance of a train such as was involved here.

There was no question but what he was far better qualified than the jurors who were ordinary laymen. The Courts have so held.

See:

Peters v. Southern Pacific Co., 160 Cal. 48, 116 Pac. 400;

Newkirk v. Los Angeles, 21 Cal. 2d 308, 131 Pac. 2d 535.

In the above cases the Court clearly states that the management and operation of trains is a matter outside the experience and knowledge of ordinary jurors, This comment by the Court certainly reduced the effectiveness of other testimony given by this witness to the prejudice of the plaintiff. This witness was amply qualified as an expert.

Weinsatts, Adm. v. L. & N., 31 S.W. 2d 734;

Chicago Great Western v. Beecher, 150 Fed. 2d 394;

Byrd v. Va. Railroad, 13 S.E. 2d 273.

It has been held prejudicial error for the Court to distort and discredit the testimony of a witness as the Court did here.

"As we stated in *Quercia v. United States,* 289 U.S. 466, 469, 53 Supreme Court 698, 699, 77 L. Ed. 1321:

'This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a wit-

ness. He may analyze and dissect the evidence, but he may not either distort it or add to it.' "

Cal-Bay Corp. v. United States, 169 Fed. 2d 15, 21.

It is submitted that this comment by the Court completely destroyed the testimony of this witness to the prejudice of the plaintiff.

SUMMATION OF ARGUMENT.

The evidence is sufficient to establish that the employees of the Southern Pacific Railroad Company other than the deceased were negligence in failing to stop the movement of the train involved in the accident when the deceased disappeared from the view of the engineer of the train. From this evidence, the jury could have found that a proximate cause of the death of deceased was the failure of other members of the train crew to follow the custom and practice and stop the train when deceased disappeared from their view. Had a judgment been rendered in favor of the plaintiff, the evidence would have been sufficient to sustain that verdict. However, there was a conflict in the evidence and because of the erroneous instructions given by the Trial Court with reference to the contributory negligence and negligence of the deceased when the law presumes that deceased was in the exercise of ordinary care and when there was no issue of contributory negligence framed by the pre-trial order, certainly such instructions were highly prejudicial to plaintiff. In addition, the Trial Court by depriving counsel for

appellant of the right to argue the case in conformity with recognized rules prevented plaintiff from having her action fairly presented to the jury. Counsel for appellant was prevented from arguing the facts with reference to the law and also was prevented from stating the full import of the Federal Employers' Liability Act. This left nothing substantial to be argued to the jury, which was certainly prejudicial to the interests of the plaintiff, for plaintiff having the burden of proof, was stopped from presenting to the jury the law that supported her contentions for a recovery. Further, the Trial Court by an unwarranted comment upon the testimony of one of plaintiff's expert witnesses tended to cast discredit upon the case of the plaintiff. The same situation was presented when defendant without having disclosed at the pre-trial hearing or by the pre-trial order established an as affirmative defense that the pictures introduced in evidence by the plaintiff were not pictures of the engine footboard involved in the accident. This was surprise which the pre-trial is supposed to eliminate, and which is not to be tolerated. This accumulative series of errors under the conflict of the testimony certainly and clearly prevented plaintiff from having a fair trial and the judgment herein should be reversed.

CONCLUSION.

It is respectfully submitted that the trial Court, by instructing the jury with reference to an issue not contained in the pre-trial order and in further con-

veying to the jury by way of erroneous instructions that the deceased was negligent inferentially cast the burden on the plaintiff to establish that the deceased was without fault. This was prejudicial error requiring a reversal of the judgment herein. In addition, the presentation of evidence by defendant which was not disclosed by the pre-trial order which allowed plaintiff to be forced into a position of having to admit that certain evidence, the pictures, was not correct, was prejudicial to plaintiff. And, then the comment of the Court with reference to one of plaintiff's witnesses could do nothing except cast doubt upon the evidence and veracity of plaintiff's witness. Finally, the Court by erroneously limiting counsel's argument, deprived plaintiff of an opportunity to have her case intelligently argued on the facts and law.

It is submitted that the judgment, because of the errors pointed out, should be reversed.

Dated, Oakland, California,
April 2, 1956.

Respectfully submitted,
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